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No. 91-1085

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT L. CHESTMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the Securities and Exchange Commission validly exercised its rulemaking authority under Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), in adopting Rule 14e-3, 17 C.F.R. 240.14e-3, an insider trading rule relating to tender offers.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A91) on rehearing en banc is reported at 947 F.2d 551. The panel opinion of the court of appeals (Pet. App. B1-B32) is reported at 903 F.2d 75. The opinion of the district court (Pet. App. C1-C25) is reported at 704 F. Supp. 451.

### JURISDICTION

The judgment of the court of appeals was entered on October 7, 1991. The petition for a writ of certiorari was filed on January 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of securities fraud (Counts 1-10), in violation of Section 10(b) of the Securities and Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), and 17 C.F.R. 240.10b-5 (Rule 10b-5); fraudulent trading in connection with a tender offer (Counts 11-20), in violation of Section 14(e) of the Exchange Act, 15 U.S.C. 78n(e), and 17 C.F.R. 240.14e-3(a) (Rule 14a-3(a)); mail fraud (Counts 21-30), in violation of 18 U.S.C. 1341; and perjury (Count 31), in violation of 18 U.S.C. 1621. He was sentenced to concurrent terms of 18 months' imprisonment on Counts 1, 11, and 21, and to a consecutive term of six months' imprisonment on Count 31. Sentence was suspended on the remaining counts in favor of three years' probation. Gov't C.A. In Banc Br. 2. The court of appeals initially reversed petitioner's convictions on all counts. Pet. App. B21. On rehearing en banc, the court affirmed petitioner's convictions on the Section 14(e) counts. Pet. App. A47.

1. Petitioner is a stockbroker. In 1982, Keith Loeb sought petitioner's services with regard to consolidating his and his wife's securities holdings in Waldbaum, Inc., a publicly traded company that owned a large supermarket chain. Loeb told petitioner that he was related to the Waldbaum family through his wife, Susan Loeb, who was the niece of Ira Waldbaum, the president and controlling shareholder of Waldbaum, Inc. From 1982 to 1986, petitioner executed several transactions in Waldbaum securities for Keith Loeb. Pet. App. A4.

On November 21, 1986, Ira Waldbaum agreed to sell Waldbaum, Inc., to the Great Atlantic and Pa-

cific Tea Company. Ira informed his sister, Shirley Witkin, and other close relatives about the sale and instructed them to keep the information confidential until the sale was publicly announced. On November 24, Shirley told her daughter, Susan Loeb, about the sale and warned Susan not to tell anyone except her husband, Keith, because disclosure could ruin the sale. The next day, Susan told Keith about the impending sale and cautioned him not to tell anyone else for the same reason. Pet. App. A3-A4.

At 8:59 a.m. the next morning, November 26, Keith Loeb made an urgent call to petitioner's office and left a message for petitioner to call back "ASAP." Loeb testified that he spoke to petitioner sometime between 9:00 a.m. and 10:30 a.m. that morning and told him that he had "some definite, some accurate information" that Waldbaum was about to be sold at a "substantially higher" price than its current market price. Loeb asked petitioner several times what petitioner thought Loeb should do. Petitioner replied that he could not tell Loeb what to do "in a situation like this," and advised Loeb to make up his own mind. Pet. App. A4-A5.

At 9:49 a.m. that morning, petitioner bought 3000 shares of Waldbaum stock for his own account at $24.65 per share. Between 11:31 a.m. and 12:35 p.m., he bought an additional 8000 shares for his clients' discretionary accounts (including 1000 shares for Loeb) at prices ranging from $25.75 to $26 per share. The tender offer for Waldbaum stock was publicly announced after the stock market closed that day. The next business day, Waldbaum stock soared to $49 per share on heavy trading. Pet. App. A5-A6. Petitioner's purchases of Waldbaum stock for himself and his clients yielded an overnight profit of more than $250,000. Gov't C.A. In Banc Br. 6.

2. Before trial, petitioner moved to dismiss the counts of the indictment charging violations of Rule 14e-3. That provision prohibits the purchase or sale of a security after a substantial step has been taken to commence a tender offer when the purchaser or seller knows that he is in possession of material, nonpublic information relating to the tender offer acquired directly or indirectly from the offeror, the issuer, or anyone acting on behalf of either.[1] Petitioner contended that in promulgating the Rule, the Securities and Exchange Commission (SEC or Commission) exceeded its authority under Section 14(e) of the Exchange Act, because the Rule does not require the breach of a fiduciary duty or confidential relationship as a prerequisite to liability. The district court rejected that contention, holding that the

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[1] Rule 14e-3 provides in pertinent part:

> (a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the "offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of Section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from (1) the offering person, (2) the issuer of the securities sought or to be sought by such tender offer, or (3) any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

rule "represents a valid exercise of the SEC's rulemaking authority." Pet. App. C10.

3. A divided panel of the court of appeals reversed petitioner's convictions on all counts. Pet. App. B1-B32. On rehearing en banc, the court of appeals affirmed petitioner's convictions under Rule 14e-3.[2] Pet. App. A7-A25, A73. Judge Meskill, joined by four other judges, found that Rule 14e-3 is a valid exercise of the SEC's rulemaking authority, supported by the language of Section 14(e), its legislative history, and congressional activity since the Commission's adoption of the Rule. Judge Meskill concluded that although the Rule does not require one of the common law elements of fraud in cases of nondisclosure—breach of a fiduciary duty—it nevertheless falls within the SEC's power to adopt under Section 14(e). He also concluded that neither *Chiarella* v. *United States*, 445 U.S. 222 (1980), nor *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1 (1985), limits the SEC's power under Section 14(e) to regulating frauds that are already prohibited at common law. Pet. App. A12-A25. Judge Winter filed a concurring opinion, joined by four judges, in which he had "little difficulty" in upholding petitioner's convictions under Rule 14e-3, concluding that it is "in the nature of a traditional prophylactic rule." Pet. App. A73.[3]

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[2] The court of appeals, by a 6-5 vote, reversed petitioner's convictions under Rule 10b-5 and the mail fraud statute. Pet. App. A28-A47, A78. The court did not rehear petitioner's appeal from his conviction of perjury, which the panel had reversed. *Id.* at A3, A47, B12-B16. The court's rulings on the Rule 10b-5, mail fraud, and perjury counts are not before this Court.

[3] Judge Mahoney dissented in part, arguing that Rule 14e-3 is invalid because it does not require proof of a breach of

## ARGUMENT

Petitioner contends (Pet. 16-29) that the Commission exceeded its rulemaking authority under Section 14(e) of the Exchange Act when it promulgated Rule 14e-3 because the Rule does not require proof of a breach of a fiduciary duty. The en banc court of appeals, which, as petitioner acknowledges, is the "first court of appeals to have considered this issue" (Pet. 6), rejected that claim by a ten-to-one vote. Because the court of appeals' decision is correct and is consistent with this Court's decisions, review by this Court is not warranted.[4]

1. Section 14(e) was enacted as part of the Williams Act, which was passed in 1968 "in response to the growing use of cash tender offers as a means for achieving corporate takeovers." *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 22 (1977). The statute makes it unlawful for any person, *inter alia*, "to engage in any fraudulent, deceptive or manipulative acts or practices" in connection with a tender offer,[5]

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fiduciary duty as a prerequisite to liability. Pet. App. A78-A91.

[4] The issue of the validity of Rule 14e-3 is currently before the Tenth Circuit in *SEC* v. *Peters*, No. 90-3346 (argued Jan. 6, 1992). In that case, the Commission is appealing from the district court's ruling that breach of a duty of trust and confidence is a required element of an insider trading claim under Rule 14e-3.

[5] As enacted in 1968, see Pub. L. No. 90-439, § 3, 82 Stat. 457, Section 14(e) provided:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading, or to engage in any fraudulent, deceptive

and, through two separate grants of rulemaking authority added in 1970, empowers the Commission to (a) "define * * * such acts and practices as are fraudulent, deceptive or manipulative" and (b) "prescribe means reasonably designed to prevent * * * such acts and practices." [6] Congress enacted the antifraud requirements of Section 14(e) to regulate the conduct of "a broad range of persons, including those engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer." *Piper*, 430 U.S. at 24; *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 8-9 (1985).

The Commission promulgated Rule 14e-3 under the rulemaking authority granted by Section 14(e). The Rule responds to the fact that tender offers present significant opportunities for insider trading abuse because "even a hint of an upcoming tender offer may send the price of the target company's stock soaring." *SEC* v. *Materia*, 745 F.2d 197, 199 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985). The prospect of virtually risk-free profits may tempt persons with material, nonpublic information to trade before that information becomes public. In order to protect against the improper exploitation of such informa-

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or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

[6] The 1970 amendment, see Pub. L. No. 91-567, § 5, 84 Stat. 1497-1498, added the following sentence to Section 14(e):

The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

tion, Rule 14e-3(a) proscribes trading while in possession of material, nonpublic information in the tender offer context without regard to whether such trading breaches a fiduciary duty.[7]

Petitioner contends (Pet. 21-23) that Section 14(e) does not authorize the Commission to promulgate Rule 14e-3 because the Rule departs from the common law principle that the nondisclosure of information is fraudulent only when such nondisclosure breaches a fiduciary duty.[8] As the court of appeals explained, however, "[t]he plain language of sec-

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[7] The Commission's enforcement experience confirms that tender offers present a situation rife with opportunities for fraud. Since its promulgation in 1980, Rule 14e-3 has been one of the government's primary weapons against the misuse of inside information in connection with tender offers. See, *e.g.*, *SEC* v. *Materia*, Fed. Sec. L. Rep. (CCH) ¶ 99,526 (S.D.N.Y. 1983), aff'd, 745 F.2d 197 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *United States* v. *Marcus Schloss & Co.*, 710 F. Supp. 944 (S.D.N.Y. 1989); *SEC* v. *Vaskevitch*, 657 F. Supp. 312 (S.D.N.Y. 1987); *SEC* v. *Musella*, 578 F. Supp. 425 (S.D.N.Y. 1984); *SEC* v. *Tome*, 638 F. Supp. 596 (S.D.N.Y. 1986), aff'd, 833 F.2d 1086 (2d Cir. 1987), cert. denied, 486 U.S. 1014 (1988); *SEC* v. *Boesky*, No. 86 Civ. 8767 (S.D.N.Y. Nov. 14, 1986) (consent judgment); *SEC* v. *Levine*, No. 86 Civ. 3726 (S.D.N.Y. May 12, 1986) (consent judgment); *SEC* v. *Drexel Burnham Lambert, Inc.*, et al., No. 88 Civ. 6209 (S.D.N.Y. June 20, 1990) (consent judgment); *SEC* v. *Milken*, No. 88 Civ. 6209 (S.D.N.Y. Apr. 24, 1990) (consent judgment).

[8] In passing, petitioner also contends (Pet. 20-21) that Rule 14e-3 is invalid because it purportedly dispenses with a requirement of intent for criminal liability. Petitioner's premise is incorrect. Rule 14e-3 is applicable in both civil and criminal proceedings; in criminal cases, the requisite level of intent is established by Section 32(a) of the Exchange Act, 15 U.S.C. 78ff(a), which specifically requires a showing of "willful[]" misconduct on the part of the defendant.

tion 14(e) represents a broad delegation of rulemaking authority," Pet. App. A12, which is not limited by the common law.[9] Each of the two grants of rulemaking authority in Section 14(e) independently justifies the adoption of Rule 14e-3.[10]

First, Section 14(e) expressly authorizes the Commission to "*define* * * * such acts and practices as are fraudulent, deceptive or manipulative" in connection with tender offers. 15 U.S.C. 78n(e) (emphasis added). In *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. at 11 n.11, the Court described that grant of authority as affording "a mechanism for defining * * * those acts and practices which involve material misrepresentation or nondisclosure" in the tender offer context. In keeping with that authority, Rule 14e-3 defines one such act of nondisclosure: it prohibits specified persons from trading while in possession of material, nonpublic information relating to a tender offer unless that information is first publicly disclosed to the market. See 17 C.F.R.

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[9] Petitioner errs (Pet. 29) in suggesting that the rule of lenity is relevant in this case. As was stated in *United States* v. *R.L.C.*, No. 90-1577 (Mar. 24, 1992) (plurality opinion), slip op. 13, the rule of lenity is "reserved * * * for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." Here, "the language of the statute is sufficiently clear to be dispositive" of the SEC's authority to promulgate Rule 14e-3. Pet. App. A13.

[10] Petitioner was not prosecuted under the self-operative portion of Section 14(e), see note 5, *supra*. Accordingly, his contention (Pet. 21) that the self-operative language of Section 14(e) does not criminalize the nondisclosure of information in the absence of a fiduciary breach, even assuming that it is correct, does not assist him.

240.14e-3(a) (prohibiting trading "unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise").

Petitioner nevertheless argues (Pet. 22) that, despite the express language of the statute authorizing the Commission to define fraud and this Court's recognition that the Commission may regulate nondisclosures, the SEC may not "determine * * * what elements comprise fraud in the securities context" but must adhere strictly to the common law. As the court of appeals observed, however, "[i]t is difficult to see how the power to 'define' fraud could mean anything less than the power to 'set forth the meaning of' fraud in the tender offer context." Pet. App. A12. If petitioner were correct in claiming that the Commission must define fraud exactly as courts have defined it under the common law, it would nullify the Commission's "defining" authority under Section 14(e) and would render that authority superfluous in light of Section 14(e)'s self-operative prohibition of "fraudulent * * * acts or practices." [11] As the court of appeals noted, "[s]uch a narrow construction of the congressional grant or authority would cramp the SEC's ability to define fraud flexibly in the context of the discrete and highly sensitive area of tender offers." Pet. App. A13.[12]

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[11] Petitioner's construction is therefore inconsistent with the settled principle that courts must "give effect, if possible, to every clause and word of a statute." *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1882)); *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992).

[12] Petitioner errs in relying (Pet. 22-23) on the statement in *Schreiber* that Congress' grant of rulemaking authority in

Second, Rule 14e-3 is independently authorized by the Commission's power under Section 14(e) to "prescribe means reasonably designed to prevent" fraud. 15 U.S.C. 78n(e). As the court of appeals recognized, that authority "necessarily encompasses the power to proscribe conduct outside the purview of fraud, be it common law or SEC-defined fraud." Pet. App. A13; cf. *Schreiber*, 472 U.S. at 11 n.11 (Section 14(e) gives the Commission "latitude to regulate nondeceptive activities as a 'reasonably designed' means of preventing manipulative acts").

Rule 14e-3(a) is reasonably designed to prevent instances of fraud in tender offers. Material, nonpublic information relating to a tender offer necessarily is circulated to many people involved in structuring the transaction. Trading on such information most likely will involve a breach of a duty of confidentiality to the bidder or target company, or to persons representing either party. The difficulties of establishing such a breach, however, may permit sophisticated insider trading to go unpunished. Rule 14e-3(a) avoids that problem by prohibiting a class of securi-

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Section 14(e) does not suggest that Congress intended "any change in the meaning of the term 'manipulative' itself," 472 U.S. at 11 n.11. The issue in *Schreiber* did not involve the scope of the SEC's rulemaking authority, because the plaintiff in that case did not allege any violation of the Commission's rules under Section 14(e). Nor is petitioner correct (see Pet. 23) in relying on the presumption that a statutory term must carry its common law meaning. When Congress specifically gives an agency the power to define a term, the presumption that the term has its common law meaning must be deemed to be displaced. Cf. *Moskal* v. *United States*, 111 S. Ct. 461, 470 (1990) ("Congress' general purpose in enacting a law may prevail over this [common law meaning] rule of statutory construction").

ties transactions in which the likelihood that such a breach of duty has occurred is great, without requiring specific proof of a breach of fiduciary duty. The Rule is therefore a "means reasonably designed" to prevent fraudulent trading on material, nonpublic information in the tender offer context.[13]

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[13] Although Rule 14e-3(a) (under which petitioner was convicted) is cast as a rule that "defines" fraudulent acts, rather than a rule that sets forth a "means reasonably designed to prevent" such acts, the court of appeals correctly determined that the Rule can be sustained under the latter authority as well. Pet. App. A13. The issue of whether the Rule is within the Commission's authority to adopt depends on whether the Commission is authorized by Congress to promulgate it, not on whether the Commission referred to the proper statutory source in doing so. Here, Section 14(e) authorizes the Commission to take the action it took, and the Commission clearly articulated the reasons why the Rule serves the purposes of that Section. Securities Exchange Act Rel. No. 34-17120, 45 Fed. Reg. 60,410, 60,413 (1980) ("In view of * * * the potential for trading by persons while in possession of material, nonpublic information relating to tender offers and the detrimental impact which such trading has on tender offer practice, shareholder protection and the securities markets, the Commission has determined that Rule 14e-3 is necessary and appropriate in the public interest and for the protection of investors."). Nothing more is required to sustain the Rule against the challenge that it violates the terms of the enabling statute. See *Olympus Corp.* v. *United States*, 792 F.2d 315, 321 n.1 (2d Cir. 1986) (upholding an agency regulation on ground not previously asserted by agency as justification for the regulation), cert. denied, 486 U.S. 1042 (1988). Cf. *Railway Labor Executives' Ass'n* v. *ICC*, 784 F.2d 959, 969 (9th Cir. 1986); *North Carolina Commission of Indian Affairs* v. *Department of Labor*, 725 F.2d 238, 240 (4th Cir.), cert. denied, 469 U.S. 828 (1984). But see *Business Roundtable* v. *Securities and Exchange Comm'n*, 905 F.2d 406, 417 (D.C. Cir. 1990) (expressing the view with respect to SEC Rule 19c-4, 17 C.F.R. 240.19c-4, that the court cannot "supply

The Commission's construction of a statute that it administers must be accorded substantial deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); *National Passenger Corp.* v. *Boston & Maine Corp.*, No. 90-1419 (Mar. 25, 1992), slip op. 9. In adopting Rule 14e-3, the Commission interpreted Section 14(e) as authorizing rules that prohibit a person from trading while in possession of material, nonpublic information in the tender offer context, without regard to whether such trading breached a fiduciary duty. Securities Exchange Act Rel. No. 34-17120, 45 Fed. Reg. 60,410, 60,411-60,413 (1980). Because the Commission's adoption of Rule 14e-3 is rational and consistent with the language and purposes of the statute, the court of appeals properly upheld the Rule.

2. Contrary to petitioner's contention (Pet. 16-20), the court of appeals' decision does not conflict with *Chiarella* v. *United States*, 445 U.S. 222 (1980), and *Dirks* v. *SEC*, 463 U.S. 646 (1983). In *Chiarella*, the Court held that Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, require proof of a breach of fiduciary duty in order to establish fraud by nondisclosure. 445 U.S. at 231-235. In *Dirks*, the Court reiterated that construction of Section 10(b) and Rule 10b-5, 463 U.S. at 654-655, and went on to describe, under those provisions, the circumstances in which a tippee has a duty to disclose nonpublic information or abstain from trading. *Id.* at 659-664.

*Chiarella* and *Dirks* have no application here. This case does not involve Section 10(b), but involves

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grounds to sustain the regulations that were not invoked by the Commission below").

the distinct issue of whether the rulemaking authority afforded to the Commission in Section 14(e) authorizes the promulgation of a trading prohibition that does not require the breach of a fiduciary duty. See Pet. App. A22. Section 10(b) was enacted in 1934, 48 Stat. 891, as a general antifraud provision that singles out no particular area of securities transactions.[14] Section 14(e), in contrast, allows the SEC to promulgate rules that go beyond existing prohibitions in the Exchange Act in order to address practices specifically in the context of tender offers.

As the court of appeals noted, Pet. App. A19-A20, Section 14(e)'s rulemaking provision is modeled, not on Section 10(b), but on Section 15(c)(2) of the Exchange Act, 15 U.S.C. 78o(c)(2), a broader provision relating to broker-dealer fraud.[15] In 1936, when the Commission sought and obtained from Congress the power to "define" fraud in what was then Section 15(c), the Commission informed Congress that the authority was sought so as to subject securities professionals to more than "the general concepts of fraud

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[14] Section 10(b) makes it unlawful, in connection with the purchase or sale of any security, to engage in any "device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 78j(b).

[15] Section 15(c)(2) prohibits, *inter alia*, "fraudulent, deceptive, or manipulative act[s] or practice[s]" and grants the Commission the same two types of rulemaking authority as appear in Section 14(e): (a) the authority to "define * * * such acts and practices as are fraudulent, deceptive, or manipulative"; and (b) the authority to "prescribe means reasonably designed to prevent * * * such acts and practices." 15 U.S.C. 78o(c)(2). Those forms of rulemaking authority are not found in Section 10(b). See note 14, *supra*.

which are already in the statute." [16] In 1938, Congress again broadened the Commission's authority by allowing it to promulgate prophylactic rules under Section 15(c)(2), so that the Commission could establish "means reasonably designed to prevent" fraud by broker-dealers in the over-the-counter markets.[17] In 1970, Congress intentionally modeled Section 14(e)'s rulemaking provision on Section 15(c)(2).[18]

Against that background, Section 14(e)'s rulemaking grant is properly read as giving the Commission the authority to regulate conduct that is not prohibited by other antifraud provisions of the statute, such as Section 10(b).[19] To read Section 14(e) as

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[16] See *Unlisted Securities: Hearings on S. 4023 Before the Committee on Interstate and Foreign Commerce*, 74th Cong., 2d Sess. 14 (1936) (testimony of SEC Chairman Landis describing purpose of the provision in regulating conduct involving broker-dealer transactions in the over-the-counter markets).

[17] See H.R. Rep. No. 2307, 75th Cong., 2d Sess. 11 (1938) (provision "clarifie[d] and broaden[ed] the power of the Commission by rules and regulations to prevent fraudulent, manipulative, and deceptive acts and practices").

[18] S. Rep. No. 1125, 91st Cong., 2d Sess. 4 (1970) ("The language of the addition to section 14(e) is identical to that contained in section 15(c)(2) of the Securities Exchange Act concerning practices of brokers and dealers in securities transactions in the over-the-counter markets.").

[19] Relying on a statement in *Schreiber*, 472 U.S. at 10, petitioner suggests (Pet. 19) that the Commission's rulemaking authority under Section 14(e) is modeled on Section 10(b). In *Schreiber*, however, the Court noted similarities between Section 10(b) and the *self-operative* prohibition in the first sentence of Section 14(e); the Court was not discussing the Commission's *rulemaking* authority in the second sentence of Section 14(e). See Pet. App. A23.

reaching only the same conduct already covered by Section 10(b) would undermine Congress' purpose to enhance the Commission's power in the tender offer context and would render Section 14(e) superfluous. Because Congress intended to give the Commission new rulemaking powers in Section 14(e), the Court's interpretation of Section 10(b) in *Chiarella* and *Dirks* is not controlling in this case.

3. Finally, petitioner errs in suggesting (Pet. 25-28) that the court of appeals improperly relied on legislative history in upholding the validity of Rule 14e-3. Although the legislative history cited by the court is not essential to sustaining the Rule, it provides strong confirmation of the Rule's validity. As the court of appeals noted, Pet. App. A15-A16, Senator Williams viewed it as of the "utmost necessity" that the Commission be granted "full rulemaking powers" under Section 14(e), see 116 Cong. Rec. 3024 (1970), and his committee was advised that the Commission thought it desirable to use that power to prohibit certain nondisclosure practices without establishing a breach of fiduciary duty.[20]

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[20] When Senator Williams asked the Commission for examples of fraudulent practices that the proposed rulemaking authority would be used to prevent, the SEC described a situation, not involving proof of a breach of fiduciary duty, in which a "person who has become aware that a tender bid is to be made, or has reason to believe that such bid will be made, may fail to disclose material facts with respect thereto to persons who sell to him securities for which the tender bid is to be made." *Hearings on S. 3431 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 12 (1970). Although petitioner seeks to downplay (Pet. 26) the SEC's description of that use of the proposed authority as a "skeletal hypothetical" that Congress may have ignored, the information was directly responsive to the explicit request of Senator Williams, who had noted that

Subsequent legislation also confirms the validity of the Rule. In 1983, a committee report on a bill to strengthen sanctions against insider trading specifically noted Rule 14e-3 and proposed no changes to it.[21] And in the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677, Congress endorsed the Commission's rules on insider trading, including Rule 14e-3, by declaring in its findings:

> [T]he rules and regulations of the Securities and Exchange Commission under the Securities Exchange Act of 1934 governing trading while in possession of material, nonpublic information are, as required by such Act, necessary and appropriate in the public interest and for the protection of investors * * *.

Pub. L. No. 100-704, § 2, 102 Stat. 4677. As this Court has observed, "it may not always be realistic to infer approval of a judicial or administrative interpretation from congressional silence alone. * * *

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the information "would be most helpful to the committee as we continue developing this legislation." *Hearings on S. 3431, supra*, at 11.

[21] See H.R. Rep. No. 355, 98th Cong., 1st Sess. 4 (1983) ("[W]hen Congress adopted the Williams Act in 1968 to regulate tender offers and other corporate acquisitions, it added a broad antifraud remedy under section 14(e), which authorizes the Commission to promulgate rules and regulations to proscribe fraudulent, deceptive and manipulative acts in connection with any tender offer. The Committee, in this regard, notes the adoption by the Commission in 1980 of Rule 14e-3, which prohibits certain persons who learn of an impending, but as yet undisclosed, tender offer from trading while in possession of that information."). The bill discussed in the report became the Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264.

But once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979) (citations omitted).[22] That observation directly applies in this case.

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[22] See also *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381-382 (1969) ("Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.") (footnote omitted); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Zemel* v. *Rusk*, 381 U.S. 1, 12 (1965). In view of Congress's actions, both before and after Rule 14e-3 was promulgated, the issue reserved in *Touby* v. *United States*, 112 S. Ct. 1752, 1756 (1991), see Pet. 28-29, with respect to the degree of guidance needed when Congress authorizes regulations that carry criminal sanctions is not presented in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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